92-1386

Supreme Court U.S.
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CASE NUMBER_____

SUPREME COURT OF THE UNITED STATES

October, 1992 Term

HAROLD F. YOUNGER

Petitioner

v.

DONNA E. YOUNGER

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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January, 1993

QUESTION PRESENTED FOR REVIEW

Whether the United States Supreme Court should grant a writ of certiorari to consider whether the Court of Appeals improperly dismissed the appeal from an order directing the arrest of a U.S. citizen who had not committed a crime or an act of contempt.

LIST OF ALL PARTIES

The following constitutes a complete list of all parties of this case:

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Order of U.S. District Court for the Southern District of Georgia (Judge John Nangle) dated June 16, 1992.

Opinion/Order of the U.S. Court of Appeals, Eleventh Circuit, dated October 14, 1992 dismissing appeal.

STATEMENT OF JURISDICTION

This court has jurisdiction to review this petition for a writ of certiorari under the provisions of 28 U.S.C. §1254, since the petition results from a decree of the United States Court of Appeals for the Eleventh Circuit entered on October 14, 1992 declining to entertain the Petitioner's appeal from an order of the United States District Court for the Southern District of Georgia entered on June 16, 1992 directing his arrest in a bankruptcy case.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF CASE

1. U.S. CONSTITUTION, AMENDMENT 5

CRIMINAL ACTIONS-PROVISIONS CONCERNING-DUE PROCESS OF LAW AND JUST COMPENSATION CLAUSES.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

[See appendix for full text of following:]

2. 28 U.S.C. §158(d)

3. 11 U.S.C. §101(13)

4. BANKRUPTCY RULES, RULE 2004

5. BANKRUPTCY RULES, RULE 2005

6. 28 U.S.C. §1334(a)

STATEMENT OF CASE

On March 27, 1992, Donna E. Younger (Respondent herein) filed an involuntary chapter 7 bankruptcy petition against her ex-husband, Harold F. Younger (Petitioner herein) in the United States Bankruptcy Court for the Southern District of Georgia as a means of enforcing the property division portion of a divorce decree. On April 15, 1992, the Respondent filed a Motion for service of the involuntary summons by publication and mail because the Bankruptcy Petitioner had been unable to find Mr. Younger for personal service. Also on April 15, 1992, the Respondent filed an ex parte Motion for examination of Harold F. Younger under Bankruptcy Rule 2004. The Bankruptcy Court granted that motion the same day.

The Bankruptcy Court's April 1 Order required Mr. Younger to appear in California for a deposition-type

examination at 2:00 p.m. on April 17, 1992, less than 48 hours after entry of the 2004 Order. The Bankruptcy Court file does not show that the clerk made any attempt to serve the April 15th Order and it was not served by the Respondent. Mr. Younger did not appear in California for the examination.

On April 28, 1992, the Respondent filed another ex parte Motion for examination of Mr. Younger pursuant to Bankruptcy Rule 2004. The Bankruptcy Court entered an Order at the same time requiring Mr. Younger to appear 3 days later for examination in Savannah on May 1, 1992 at 2:00 p.m. Again, the Bankruptcy Court file does not include a certificate showing any attempt to serve this 2004 order. It was not served by the Respondent. There is no evidence that the Respondent attempted to subpoena Mr. Younger.

On April 30, 1992, the Bankruptcy Court issued an order under Rule 2004 amending the April 28th order. The amended order required Mr. Younger to appear for examination in Savannah at 10:00 a.m. on May 5, 1992. Again, the Bankruptcy Court file does not include a certificate showing any attempt to serve the amended 2004 order. It was not served by the Respondent. There is no evidence that the Respondent attempted to subpoena Mr. Younger. Again, Mr. Younger did not appear for examination.

At the time each of the Rule 2004 Orders was entered by the Bankruptcy Court, Mr. Younger had not been made a party to the involuntary bankruptcy case by service of a summons. Finally, on May 21, the Bankruptcy Court concluded that service of the involuntary chapter 7 petition had been accomplished by publication and entered an Order adjudicating Mr. Younger an

involuntary bankrupt.

On June 11, 1992, the Respondent filed a Motion pursuant to Bankruptcy Rule 2005, asking that Mr. Younger be arrested and compelled to submit to an examination pursuant to Bankruptcy Rule 2004. The Bankruptcy Court declined to entertain the Motion. The United States District Court withdrew reference of the bankruptcy case for the limited purpose of dealing with the Rule 2005 Motion. The U.S. District Court exercised jurisdiction pursuant to 28 U.S.C. §1334(a).

On June 16, 1992, the District Court issued an order directing the U.S. Marshall to arrest Mr. Younger and bring him before the Court for examination. The District Court's docket does not reflect a hearing on the Motion and the order was presumably based solely on the affidavit of Donna E. Younger and any documents in the Bankruptcy Court file. In his appeal to the Eleventh

Circuit Court of Appeals, Mr. Younger asserted that the affidavit of Donna Younger did not include any facts which Rule 2005 requires as the basis for issuance of an ex parte arrest order.

Mr. Younger was arrested on June 25, 1992, in Jacksonville, Florida. He was subsequently jailed pending a Rule 2004 examination. At that examination, he properly invoked the 5th Amendment. He was re-jailed until the U.S. Attorney could arrange a grant of immunity. When he was granted immunity, Mr. Younger again declined to testify and was ordered jailed as a civil contemnor/recalcitrant witness. He remains incarcerated as of the date of this petition.

ARGUMENT AND CITATION OF AUTHORITY

Whether the United States Supreme Court should grant the writ of certiorari to consider whether the Court of Appeals improperly dismissed the appeal from an order directing the arrest of a U.S. citizen who had not committed a crime or an act of contempt.

By order issued on October 14, 1992, the United States Court of Appeals for the Eleventh Circuit dismissed the Petitioner's appeal. The Circuit Court held that the District Court's arrest order of June 16, 1992, was a nonappealable interlocutory order. The practical and legal consequences of the Circuit Court's order are unconscionable: A person like the Petitioner may be unlawfully arrested pursuant to Bankruptcy Rule 2005, without being accused of a crime or any act of contempt, and be barred from making an appellate challenge of his arrest.

Under the traditional definition, a final order is one which leaves nothing to be done except to enforce by execution what has been determined. Catlin v. United States, 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911 (1945). A bankruptcy case, by its nature, does not necessarily lead to the entry of any order which is enforceable by execution. This fact has led appellate courts to conclude that a different standard of finality applies to orders which issue in a bankruptcy case. In re Lift & Equipment Service, Inc., 816 F.2d 1013 (5th Cir., 1987); In re Fox, 762 F.2d 54 (7th Cir., 1985); T&B Scottdale Contractors, Inc. v. U.S., 866 F.2d 1372 (11th Cir., 1989). In the bankruptcy context, an order is final which disposes of a discrete element of the bankruptcy case, leaving nothing but ministerial acts to be done pursuant to that order. Id.

Clearly the order mandating Mr.

Younger's arrest satisfies the bankruptcy standard of finality. The District Court's arrest order was final upon entry, to be fully executed by the ministerial act of Mr. Younger's arrest. While any number of issues remain to be adjudicated as part of Mr. Younger's bankruptcy, neither the Bankruptcy Court nor the District Court will necessarily enter another order in the bankruptcy case which will be more final for purposes of appellate review of the issues raised by the arrest order.

The Circuit Court's refusal to reach the merits of Mr. Younger's appeal would allow an egregious violation of Due Process to go uncorrected. Once an involuntary bankruptcy petition is filed, the prospective involuntary debtor is a "Debtor" subject to Bankruptcy Rule 2005, regardless of whether service of the involuntary petition has been accomplished. 11 U.S.C. §101(13). Any such person may be

ordered arrested under Bankruptcy Rule 2005. Under the Circuit Court's definition of finality, the arrested person may never have the opportunity to make an appellate challenge to the legality of an inadequate ex parte Rule 2005 affidavit upon which the arrest order is based.

As is illustrated by the facts of this case, Bankruptcy Rule 2005 confers an awesome, unique, and arguably unconstitutional power on the Bankruptcy Court. The court may order the prophylactic arrest and imprisonment of a person who may be subsequently adjudicated an involuntary bankrupt and whose testimony may be needed in the future in a bankruptcy case. The person to be arrested (as with Mr. Younger) need not have been accused of any crime or found to be in contempt of an order of court. He may be held indefinitely under a Rule 2005 order pending examination. As in Mr. Younger's

case, the arresting court may thereafter enter many additional interlocutory orders relating to the examination or incarceration of the Debtor. Any such order will be non-final and non-appealable. If the arrested Debtor immediately testifies, the arresting court may decide not to issue any additional order: Therefore, if the arrest order is not a final order, it will never be subject to appeal. In either event, the Circuit Court's interpretation of the finality requirement of 28 U.S.C. §158(d) deprives the arrested Debtor of appellate review of the propriety of his arrest.

Unless the Supreme Court grants a writ of certiorari, there may be no other opportunity for the Court of Appeals to correct the District Court's error in ordering the arrest of Mr. Younger. Therefore, the Petitioner respectfully requests that a writ of certiorari be

granted so that this Court may direct the Eleventh Circuit Court of Appeals to consider the merits of Petitioner's appeal.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests that this Honorable Court grant his petition for a writ of certiorari.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8628

HAROLD F. YOUNGER
Petitioner

v.

DONNA E. YOUNGER
Respondent

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8628

D.C. Docket No. MC-492-37

IN RE: HAROLD F. YOUNGER,

Debtor.

DONNA E. YOUNGER,

Petitioner-Appellee,

versus

HAROLD F. YOUNGER,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Georgia

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(October 14, 1992)

Before TJOFLAT, Chief Judge, Fay, and Cox, Circuit Judges.

PER CURIAM:

The order challenged in this appeal is a nonappealable interlocutory order. Accordingly, we lack jurisdiction to entertain this appeal, and it is DISMISSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN RE: HAROLD F. YOUNGER,)
)
Debtor.)
)
Bankruptcy #92-40607)

MISC. CASE NO. 492-037

ORDER

The United States Marshal for this District or any district in which the Debtor Harold F. Younger may be found is hereby directed to bring the Debtor, Harold F. Younger before the Court without unnecessary delay. If the said Debtor is found in a District other than the Southern District of Georgia, the Marshall is directed to take into custody and remove him to this Court. If custody is taken at a place less than 100 miles from this Court, the Debtor, Harold F. Younger shall be brought forthwith before this Court, and if taken at a place 100 miles or more from

this Court, the Debtor shall be brought without unnecessary delay before the nearest United States Magistrate, United States Bankruptcy Judge, or District Court Judge for a hearing as provided for in Bankruptcy Rule 2005 B2.

SO ORDERED this 16th day of June, 1992.

/s/John G. Nangle

Judge, United States District Court Southern District of Georgia

28 U.S.C.S §1334(c)

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11 [11 USCS §§ 101 et seq.]

28 U.S.C. §158(d)

The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees

entered under subsections (a) and (b) of this section.

11 U.S.C. §101(13)

"debtor" means person or municipality concerning which a case under this title has been commenced;

BANKRUPTCY RULES RULE 2004

RULE 2004. EXAMINATION

(a) **EXAMINATION ON MOTION.** On motion of any party in interest, the court may order the examination of any entity.

(b) **SCOPE OF EXAMINATION.** The examination of an entity under this rule or of the debtor under §343 of the Code may relate only to the acts, conduct or property or to the liabilities and financial conditions of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a

family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor; and any other matter relevant to the case or to the formulation of a plan.

(c) **COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTARY EVIDENCE.**

The attendance of an entity for examination and the production of documentary evidence may be compelled in the manner provided in Rule 9016 for the attendance of witnesses at a hearing or trial.

(d) **TIME AND PLACE OF EXAMINATION OF DEBTOR.**

The court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates, whether within or without the district wherein the case is pending.

(e) **MILEAGE.**

An entity other than a debtor shall not be required to attend as a witness unless lawful mileage and witness fee for one day's attendance shall be first tendered. If the debtor resides more than 100 miles from the place of examination when required to appear for an examination under this rule, the mileage allowed by law to a witness shall be tendered for any distance more than 100 miles from the debtor's residence at the date of the filing of the first petition commencing a case under the Code or the residence at the

time the debtor is required to appear for the examination, whichever is the lesser.

BANKRUPTCY RULES RULE 2005

RULE 2005. APPREHENSION AND REMOVAL OF DEBTOR TO COMPEL ATTENDANCE FOR EXAMINATION.

(a) **ORDER TO COMPEL ATTENDANCE FOR EXAMINATION.** On motion of any party in interest supported by an affidavit alleging (1) that the examination of debtor is necessary for the proper administration of the estate and that there is reasonable cause to believe that the debtor is about to leave or has left the debtor's residence or principal place of business to avoid examination, or (2) that the debtor has evaded service of a subpoena or of an order to attend or examination, or (3) that the debtor has willfully disobeyed a subpoena or order to attend for examination, duly served, the court may issue to the marshal,

or some other officer authorized by law, an order directing the officer to bring the debtor before the court without unnecessary delay. If, after hearing, the court finds the allegations to be true, the court shall thereupon cause the debtor to be examined forthwith. If necessary, the court shall fix conditions for further examination and for the debtor's obedience to all orders made in reference thereto.

(b) **REMOVAL.** Whenever any order to bring the debtor before the court is issued under this rule and the debtor is found in a district other than that of the court issuing the order, the debtor may be taken into custody under the order and removed in accordance with the following rules;

(1) If taken at a place less than 100 miles from the place of the order, the debtor shall be brought forthwith before the court that issued the order.

(2) If taken at a place 100 miles or more from the place of issue of the order, the debtor shall be brought without unnecessary delay before the nearest United States magistrate, bankruptcy judge, or district judge. If, after hearing, the magistrate, bankruptcy judge, or district judge finds that an order has issued under this rule and that the person in custody is the debtor, or if the person in custody waives a hearing, the magistrate, bankruptcy judge, or district judge shall issue an order of removal and the person in custody shall be released on conditions assuring prompt appearance before the court which issued the order to compel the attendance.

(c) **CONDITIONS OF RELEASE.** In determining what conditions will reasonably assure attendance or obedience under subdivision (a) of this rule or appearance under subdivision (b) of this rule, the court shall be governed by the provisions and policies of title 18, U.S.C. §3146(a) and (b).

No. 92-1386

In The
Supreme Court of the United States
October Term, 1992

HAROLD F. YOUNGER,

Petitioner,

v.

DONNA E. YOUNGER,

Respondent.

Petition For Writ of Certiorari
To the United States Court of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSTION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the Court of Appeals properly dismissed as interlocutory Mr. Younger's appeal from an order issued pursuant to FED. R. BANKR. P. 2005 directing his apprehension?

B. Whether Mr. Younger's petition is now moot because the order appealed from has been fully executed and reversal would have no effect on Mr. Younger's incarceration?

C. Whether Mr. Younger's Petition should be denied because he requests an advisory opinion, since the issue on appeal is inconsistent with the facts of this case?

D. Whether there are special and important reasons for granting Mr. Younger's writ as required by Rule 10 of the Rules of the Supreme Court, because Mr. Younger could end his incarceration by submitting to the FED. R. BANKR. P. 2004 examination ordered by the district court?

The last question should be answered negatively, the others affirmatively, and the petition should be denied.

LIST OF ALL PARTIES

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I. OPINIONS AND JUDGMENTS BELOW

This appeal was expedited in the Eleventh Circuit and was briefed and argued on Record Excerpts submitted by the Petitioner and an Appendix submitted by the Respondent without a record from the District Court. References to the Record Excerpts herein are "R.E. ___" and references to the Appendix are "App. ___."

This case results from Mr. Younger's attempt to conceal his assets and person from the jurisdiction of the United States Bankruptcy Court for the Southern District of Georgia, and from his refusal to submit to an examination as ordered pursuant to FED. R. BANKR. P. 2004. Respondent, Ms. Younger, filed an involuntary bankruptcy petition on March 27, 1992, against Mr. Younger, after Mr. Younger began transferring his assets to his relatives in California. (App. 6 at 3). The bankruptcy court issued an order for relief on May 21, 1992. (App 7).

The United States District Court for the

Southern District of Georgia issued orders which: provided for partial withdrawal of the reference from the bankruptcy court, (R.E. 2), directed the apprehension of Mr. Younger pursuant to FED. R. BANKR. P. 2005 to conduct a FED. R. BANKR. P. 2004 examination, (R.E. 1); determined the conditions necessary to compel Mr. Younger's appearance before his creditors for examination, (R.E. 4); granted Mr. Younger use and derivative use immunity, (App. 13); set Mr. Younger's conditions of release, and found Mr. Younger in civil contempt for his continued refusal to submit to a FED. R. BANKR. P. 2004 examination, (A-1). Mr. Younger has also appealed the November 20 order to the United States Court of Appeals for the Eleventh Circuit. (A-2).

Mr. Younger appealed the district court's June 16 order which directed the U.S. Marshal to take Mr. Younger into custody and remove him to the United States District Court for the

Southern District of Georgia. (R.E. 1 at 1). On October 14, 1992, the United States Court of Appeals for the Eleventh Circuit dismissed Mr. Younger's appeal as a nonappealable interlocutory order. (A-3).

II. JURISDICTION

The parties are in agreement as to jurisdiction of this Court.

III. STATUTES AND RULES INVOLVED

1. 28 U.S.C. § 158(d)
2. 28 U.S.C. § 1291
3. FED. R. BANKR. P. 2004
4. FED. R. BANKR. P. 2005

IV. STATEMENT OF THE CASE

Ms. Younger filed an involuntary bankruptcy petition on March 27, 1992, against Mr. Younger in the United States Bankruptcy Court for the Southern District of Georgia. Ms. Younger diligently attempted to serve the involuntary

petition of bankruptcy on Mr. Younger by every means possible, in compliance with the orders of the bankruptcy court and FED. R. BANKR. P. 1010.

On March 27, 1992, the bankruptcy court issued its original summons directed to Mr. Younger and personal service was attempted for approximately one month before service by mail to the last known address and publication was ordered on April 15, 1992. On the same day, the bankruptcy court issued its first order for examination of Mr. Younger pursuant to FED. R. BANKR. P. 2004. A second order for examination was entered on April 28, 1992, and was amended on April 30. On May 26, 1992, the bankruptcy court ordered Mr. Younger to file schedules and issued a notice of a meeting of creditors to be held on June 22. The notice was duly served at the Defendant's last known address by mail on May 27, 1992. A corrected notice of the creditors' meeting was likewise mailed May 29,

1992. Subsequently, another mailing address for Mr. Younger was located at a private post office in Jacksonville, Florida and notices from the bankruptcy court were sent to that address. The bankruptcy court ruled in its order for relief entered May 21, 1992, that service had been perfected in accordance with FED. R. BANKR. P. 1010. (App. 6).

After the reference of the bankruptcy proceeding had been partially withdrawn, (R.E. 2), on June 16, 1992, the district court issued an order directing the United States Marshal to bring Harold F. Younger before the court for a hearing pursuant to FED. R. BANKR. P. 2005(b)(2). (R.E. 1). Mr. Younger was apprehended in Jacksonville and brought before the United States District Court for the Middle District of Florida on June 25, 1992. (App. 2). That was Mr. Younger's first appearance pursuant to the bankruptcy proceeding after three months of concerted efforts, spanning the continent, to

conceal himself and his assets. At that time, Mr. Younger consented to the mandate of the June 16 Order that he be ordered to appear in the Southern District of Georgia. (App. 5).

It is noteworthy that in his Petition Mr. Younger fails to mention the reason for the difficulties in serving him with the various orders and notices of the bankruptcy court. On July 1, 1992, after Mr. Younger's apprehension by the Marshals the district court found in its conclusions of law that "[t]he evidence proffered at the Rule 2005 hearing, which was uncontroverted by the debtor, establishes that he did in fact receive notice of the bankruptcy proceeding despite his calculated efforts to avoid service." (R.E. 4 at 7).

In an order dated July 1, 1992, which determined the measures necessary to compel Mr. Younger to appear before his creditors for examination, the district court held that Mr. Younger had attempted to conceal himself and

his assets from the court and willfully attempted to evade service of the orders and subpoenas issued by the bankruptcy court. (R.E. 4 at 6, 8). The court further found that it must be inferred that Mr. Younger was aware of the bankruptcy proceedings because in California he affirmatively pleaded the automatic stay imposed in the bankruptcy case as grounds for dissolving a temporary injunction that Ms. Younger had obtained blocking his access to certain accounts. (R.E. 4 at 4-5).

Since Mr. Younger's apprehension he has contumaciously refused to submit to a FED. R. BANKR. P. 2004 examination despite being granted use and derivative use immunity on July 13, 1992. (App. 12 and 13). On October 14, 1992, the United States Court of Appeals for the Eleventh Circuit dismissed Mr. Younger's appeal of the June 16 order, holding that it was a nonappealable interlocutory order. (A-3). On

November 20, 1992, the district court found Mr. Younger in civil contempt for his refusal to submit to examination in spite of the grant of immunity. (A-2).

V. SUMMARY OF ARGUMENT

First, the writ should be denied because the Court of Appeals correctly found that the June 16 order directing Mr. Younger's apprehension is a nonappealable interlocutory order.

Second, Mr. Younger's Petition is now moot because the order appealed from was fully executed on June 24 and 25, 1992, by Mr. Younger's apprehension in the Jacksonville, Florida and his removal to the Southern District of Georgia. Moreover, reversal of the June 16 order would have no effect on Mr. Younger's present incarceration or conditions of release. Mr. Younger is now subject to the November 20 order which held him in civil

contempt and set the conditions of his release[1] as well as the July 1 and July 13 orders setting conditions of his release pending the completion of his examination.

Third, Mr. Younger's Petition should be denied because he requests an advisory opinion on the issue of "whether the Court of Appeals improperly dismissed the appeal from an order directing the arrest of a U.S. citizen who had not committed a crime or an act of contempt." (Mr. Younger's petition at 9). The issue raised in Mr. Younger's Petition is inapplicable to FED. R. BANKR. P. 2005.

Finally, there are no special and important reasons for granting Mr. Younger's writ as required by Rule 10 of the Rules of the Supreme Court. Mr. Younger could end his incarceration

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[1] On appeal the November 20 order was vacated and remanded to the District Court because it failed to limit Mr. Younger's incarceration for contempt to 18 months. *In re Younger*, No. 93-8045 (11th Cir. March 5, 1993).

by submitting to the FED. R. BANKR. P. 2004 examination ordered by the district court, something that he is legally obligated to do anyway.

VI. ARGUMENT

A. THE COURT OF APPEALS PROPERLY DISMISSED AS INTERLOCUTORY MR. YOUNGER'S APPEAL FROM THE ORDER DIRECTING HIS APPREHENSION.

1. The Order Appealed From Is Not A Final Order Under 28 U.S.C. §1291 Because It Did Not Resolve The Scope And Terms Of Mr. Younger's Incarceration Or Examination.

28 U.S.C. § 1291 grants jurisdiction to the courts of appeal over appeals from all final decisions of the district courts. *Huie v. Bowen*, 788 F.2d 698, 701 (11th Cir. 1986). Mr. Younger mistakenly asserts that "the Circuit Court's interpretation of the finality requirement of 28 U.S.C. § 158(d) deprives the arrested Debtor of appellate review of the propriety of his arrest." (Mr. Younger's

Petition at 13). 28 U.S.C. § 1291 governed the appeal below. The Eleventh Circuit Court of Appeals has adopted the traditional interpretation of the term finality, as a decision adjudicating all rights, "leaving nothing for the court to do but execute the judgment." *In re Martin Bros. Toolmakers, Inc.*, 796 F.2d 1435, 1437 (11th Cir. 1986) (quoting *Catlin v. United States*, 324 U.S. 229 (1945)). Appeals of interlocutory orders are not permitted under the Bankruptcy Code. *In re Regency Woods Apartments, Ltd.*, 686 F.2d 899, 901 (11th Cir. 1982).

The June 16 order is not a final order because it did not resolve the permissible scope and terms of Mr. Younger's incarceration or examination. *In re Blinder, Robinson & Co., Inc.*, 127 B.R. 267, 272 (D. Colo. 1991). An order concerning a FED. R. BANKR. P. 2004 examination is only considered final where the dispute has been narrowed and there is no

indication that further action by the Court will be forthcoming. *Blinder*, at 272-73; *see In re Tidewater Group, Inc.*, 734 F.2d 794, 795-96 (11th Cir. 1984).

The order simply stated: "the Debtor shall be brought without unnecessary delay before the nearest United States Magistrate, United States Bankruptcy Judge, or District Court Judge for a hearing as provided for in Bankruptcy Rule 2005(b)(2)." (R.E. 1). The order only provided for the intervening process of bringing Mr. Younger before a court for the purpose of establishing appropriate conditions of release to assure his presence in court and to provide for a FED. R. BANKR. P. 2004 examination. Orders that do not directly affect the disposition of the estate's assets and that are merely a preliminary step in a phase of a bankruptcy proceeding are held to be interlocutory. *In re Delta Services Industries*, 782 F.2d 1267, 1270-71 (5th Cir.

1986).

2. **The District Court Has Entered Subsequent Orders Amending The Conditions Of Mr. Younger's Incarceration.**

The June 16 order's lack of terms concerning Mr. Younger's incarceration and examination required the district court to take further action regarding those issues in its July 1 order; July 13 order; July 16 order; and November 20 order. Since the conditions of Mr. Younger's release and scope and terms of the FED. R. BANKR. P. 2004 examination have now been amended by four orders subsequent to the June 16 order, the order appealed from was not a final judgment and is not appealable. *Blinder*, 127 B.R. at 272-73; *Four Seas Center, Ltd. v. Davres, Inc. (In re Four Seas Center, Ltd.)*, 754 F.2d 1416, 1418 (9th Cir. 1985); *see In re Chateaugay Corp.*, 120 B.R. 707, 711-12 (S.D.N.Y. 1990).

Mr. Younger's assertion in his Petition that

he is being imprisoned pursuant to the order appealed from is incorrect. (Mr. Younger's Petition at 12). The order appealed from has been fully executed and has no present vitality.

3. The Order Appealed From Is Interlocutory Because It Is A Discovery Order.

The June 16 Order is a discovery order[2] issued to ensure the debtor's attendance at an examination. *See In re Charters Int'l Co., Inc.*, No. 89-2453-0, WL 81767, at *1 (D. Kan. May 21, 1990). Generally, an order compelling discovery is interlocutory and not an appealable final order. *Robinson v. Tanner*, 798 F.2d 1378 (11th Cir. 1986).

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[2]A discovery order is considered to include an order granting, denying, or otherwise relating to an application by a litigant for judicial assistance to enable him to ascertain information, or the existence or location of evidence, in order to prepare for, or use at, a pending or anticipated trial or hearing. Milton Roberts, Annotation, *Appealability of Discovery Order as "Final Decision" under 28 U.S.C. § 1291*, 36 A.L.R. FED. 763, 768 (1978).

This rule extends to orders compelling a party to submit to depositions and produce documents. *Digital Data Systems, Inc. v. Carpenter*, 387 F.2d 529, 533 (5th Cir. 1967) (order of district court in bankruptcy proceeding requiring production of documents was not final appealable decision); *see Carr v. Monroe Manufacturing Co.*, 431 F.2d 384, 386 (5th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971) (order directing a party to testify or produce documents in response to a subpoena or a notice is not immediately appealable); *see Chapman v. Goodman*, 219 F.2d 802, 806 (9th Cir. 1955) (order directing witness to appear and give testimony was not final appealable order).

Mr. Younger's apprehension by United States Marshals pursuant to the June 16 order was effectively a discovery enforcement stemming from his complete disregard of the bankruptcy proceedings against him. Sanctions for discovery failures are by their very nature

interlocutory and therefore are not appealable. *In re Rubin*, 693 F.2d 73 (9th Cir. 1982).

B. MR. YOUNGER'S PETITION IS NOW MOOT BECAUSE THE ORDER APPEALED FROM HAS BEEN FULLY EXECUTED.

The order appealed from was fully executed on June 24 and 25, 1992, by the Marshals' apprehension of Mr. Younger in Jacksonville, Florida. Even if the Court were to rule that the order appealed from is an appealable order, reversal of the June 16 order would have no effect on Mr. Younger's incarceration or conditions of release, as Mr. Younger's incarceration is now governed by the July 1 order, July 13 order, and the November 20 order.

"A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *St. Pierre v. United*

States, 319 U.S. 41, 42 (1943). Review is only permitted where the judgment of the appellate court will have some material effect, *Pollard v. United States*, 352 U.S. 354, 358 (1957), and will result in the granting of relief. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). After the execution of the June 16 order there is no longer a subject matter on appeal on which the judgment of the court can operate. *St. Pierre v. United States*, 319 U.S. at 42.

C. MR. YOUNGER REQUESTS AN ADVISORY OPINION.

The Court should not render the advisory opinion which Mr. Younger requests regarding the issue in his Petition. The issue that Mr. Younger would have the Court adjudicate on the merits is: "whether the Court of Appeals improperly dismissed the appeal from an order directing the arrest of a U.S. citizen who had not committed a crime or an act of contempt."

(Mr. Younger's Petition at 9). Mr. Younger argues that: "A person like the Petitioner may be unlawfully arrested pursuant to Bankruptcy Rule 2005, without being accused of a crime or any act of contempt, and be barred from making an appellate challenge of his arrest," (Mr. Younger's Petition at 9), and that "[t]he person to be arrested (as with Mr. Younger) need not have been accused of any crime or found to be in contempt of an order of court. He may be held indefinitely under a Rule 2005 order pending examination." (Mr. Younger's Petition at 12).

Respondent, Ms. Younger, respectfully submits to the Court that the above-quoted issue is inapplicable to Mr. Younger because Mr. Younger had committed various acts of contempt prior to the June 16 order's issuance. The district court held that prior to his apprehension "the debtor has willfully attempted to evade service of the orders and subpoenas issued by the

Bankruptcy Court," (R.E. 4 at 6), that "he did in fact receive notice of the bankruptcy proceeding despite his calculated efforts to avoid service," (R.E. 4 at 7), and that "[h]e has attempted to conceal himself and his assets in Florida and California . . ." (R.E. 4 at 8). The district court's conclusions show that Mr. Younger is requesting the Court to issue an advisory opinion based upon a hypothetical situation which is inconsistent with the district court's findings of fact. A case must consist of a present, live controversy in order to "avoid advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam). Mr. Younger's statement of the issue in this case does not constitute a "real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law should be upon a hypothetical state of facts." *Aetna*

Life Insurance Co. v. Haworth, 300 U.S. 227, 241 (1937).

D. THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING MR. YOUNGER'S WRIT BECAUSE MR. YOUNCER COULD END HIS INCARCERATION BY SUBMITTING TO THE FED. R. BANKR. P. 2004 EXAMINATION ORDERED BY THE DISTRICT COURT.

Rule 10 of the Supreme Court Rules states that "[a] petition for writ of certiorari will be granted only when there are special and important reasons therefore." No special and important reasons for granting the writ exist because Mr. Younger's incarceration would cease upon his compliance with the district court's July 13 order. The July 13 order granted Mr. Younger use and derivative use immunity and directed him to submit to an examination pursuant to FED. R. BANKR. P. 2004. The November 20 order found Mr. Younger in willful and deliberate civil contempt for his refusal to comply with the July 13 order, and provided that Mr. Younger would be released when he

fully complies with the July 13 order.

A civil contempt sanction is a coercive device imposed to secure compliance with a court order. *Shillitani v. United States*, 384 U.S. 364, 370 (1966). "Where the court exercises such coercive power, however, for the purpose of compelling future obedience, those imprisoned 'carry the keys of their prison in their own pockets;' by obedience to the court's valid order, they can end their confinement . . ." *United States v. United Mine Workers*, 330 U.S. 258, 331-32 (1947) (citations omitted).

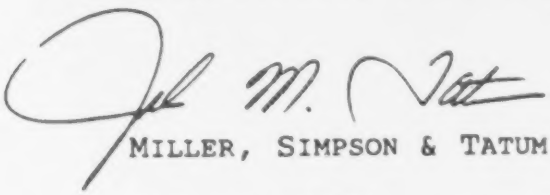
VII. CONCLUSION

Mr. Younger has not set forth any valid reason for the Court to grant the writ. Despite the district court's issuance of four orders that amended the terms and scope of Mr. Younger's incarceration subsequent to its June 16 order, Mr. Younger erroneously contends that

the order was final for purposes of appeal. Notwithstanding the district court's subsequent orders which set the terms of Mr. Younger's incarceration and release, found him in civil contempt, and thereby mooted the June 16 order which simply provided for his apprehension, Mr. Younger continues to assert that the June 16 order is the source of his confinement. Mr. Younger requests the Court to issue what amounts to an advisory opinion, because the issue he sets forth in his petition is inconsistent with the facts of this case. Finally, Mr. Younger has not presented special and important reasons that would entitle him to have the Court hear his appeal. This entire litigation has as its source Mr. Younger's contumacious refusal to submit to a FED. R. BANKR. P. 2004 examination. Should he submit to the district court's valid order, he will be released from his incarceration. He "carries the keys to his prison in his own pocket."

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

In the Matter of:	)	
Harold F. Younger,	)	Misc. Case No.
Debtor.	)	492-37

ORDER

This matter was heard pursuant to the Certification of United States Magistrate Judge G.R. Smith entered on November 6, 1992. Present at the hearing in the district court were all interested persons, including Mr. Younger and his attorney. The Court heard from Mr. Younger's attorney. While his attorney did not agree with the Magistrate Judge's findings, he could not articulate any legal basis for the Court not to affirm Magistrate Judge Smith's order. The Court advised Mr. Younger that he had the right to testify and to make a statement. In his response to the Court's invitation he adopted his counsel's statement. Therefore the debtor has not contested the findings of fact made by the Magistrate Judge as recited in his order of November 6, 1992.

ACCORDINGLY, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the United States Magistrate Judge's recommendation that the debtor be subject to civil contempt proceedings is hereby granted. Debtor, Harold F. Younger, is found in willful and deliberate contempt and in violation of the Court's Order, dated July 13, 1992, granting the debtor use and derivative use immunity and directing him to submit to an examination pursuant to Bankruptcy Rule 2004 for his continued refusal to submit to such examination.

2. Debtor shall be held in the custody of the United States Marshal until such time as he

shall fully comply with the July 13, 1992 Order.

SO ORDERED this 20th day of November, 1992.

/s/
Honorable B. Avant Edenfield
Chief United States District Judge for the Southern District of Georgia

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

In re:	§	
	§	
Harold F. Younger	§	Misc.
Appellant	§	Case No. 492-037

NOTICE OF APPEAL

Notice is hereby given that Harold F. Younger appeals to the United States Court of Appeals for the Eleventh Circuit from an Order issued by the U.S. District Court dated November 20, 1992 pursuant to 28 U.S.C. §1826. By virtue of that Order Mr. Younger is being imprisoned indefinitely rather that for a maximum of 18 months as required by said statute. The time for filing this notice of appeal was extended by Order of the U.S. District Court to January 8, 1993.

This 8th day of January, 1993.

Respectfully submitted,
McCallar and Associates
By: /s/ C. James McCallar, Jr.
By: /s/ Mark Bulovic
Attorneys for the Debtor

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* * * *

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8628

D.C. Docket No. MC-492-37

IN RE: HAROLD F. YOUNGER,
Debtor.

DONNA E. YOUNGER,
Petitioner-Appellee,
versus
HAROLD F. YOUNGER,
Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Georgia

(October 14, 1992)

Before TJOFLAT, Chief Judge, FAY, and COX, Circuit Judges.

PER CURIAM:

The order challenged in this appeal is a nonappealable interlocutory order. Accordingly, we lack jurisdiction to entertain this appeal, and it is

DISMISSED.